(23)

No. 675

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1941

Ralph F. Wiechers, Trustee in Bankruptcy of The Mutual Investment and Security Company, Bankrupt,
Petitioner and Appellee, Below,

vs.

Minnie C. Hansen, Thyra H. Mahrer Behrens, W. J. O'Neill, J. F. McGraw, Catherine J. Hanna, P. B. McAtee, May Walshe, Frances E. Johnston, E. P. Mitchell, Kate A. Mitchell, Margaret Swink, Laura E. Parker, and Albert J. Gould,
Respondents and Appellants, Below.

BRIEF OF THE RESPONDENTS, APPELLANTS BELOW, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

Albert J. Gould,
Attorney for Respondents.

October, 1941

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121 Fed. (2d) 1011

No. 673

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1941

EARLE F. WINGREN, Trustee in Bankruptcy of The Mutual Investment and Security Company, Bankrupt,
Petitioner and Appellee, Below,

vs.

MINNIE C. HANSSEN, THYRA H. MANKIN BERGER, W. J. O'NEILL, J. F. MCGRAW, CATHERINE J. HANNA, P. B. MCATEE, MAY WALSHE, FRANCIS E. JOHNSTON, E. F. MITCHELL, KATE A. MITCHELL, MARGARET SWINK, LAURA E. PARKER, and ALBERT J. GOULD,
Respondents and Appellants, Below.

BRIEF OF RESPONDENTS, APPELLANTS BELOW, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Trustee Wingren's Petition and Brief are predicated on alleged premises of fact which, it is submitted, no fair reading of the record will support. No reference is had to vital facts on which the Circuit Court of Appeals based its decision. Much stress is placed upon a mass of prolix details irrelevant to determination there or here.

Moreover, the 64-page petition and brief of the Trustee contains 120 citations of cases and 80 citations of statutory sections, Rules of Court and general orders and Text Book pages or sections, resulting in an aggregate of 200 citations of alleged legal authority. So likewise, between its "Questions Presented", "Reasons Relied On", "Grounds of Jurisdiction", "Specification of Errors", "Summary of Argument", and "Argument", petitioner raises no less than 59 numbered points of law allegedly involved in the case.

If all of this does not offend against Rule 38 (2), whereby this Court requires that such a petition and brief be concise, it must at least be regarded as thoroughly confusing the issues on what was, is and should be a relatively simple case.

In view of the Rule last cited, the Court will not wish us in this brief to seek to trace down every lurking error or omission, misstatement, fallacy, or irrelevancy, as we see it, in opposing petition and argument. The simplest and best method seems to be, for purposes of convenience and clarity, to resummarize the Record as already correctly stated in the opinion and both of our briefs in the Circuit Court of Appeals, which restatement of fact will itself constitute an adequate rebuttal to most of the considerations urged in Petition and Brief of opponent.

FACTS

(Op. C. C. A. (10th Circ.) Rec. p. 200-204)
121 Fed. (2d) 1011

Prior to December, 1935, money of the group comprised of Hanssen and others, Respondents here, was stolen, embezzled, or converted by The Mutual Company, subsequent debtor in 77-B and still later the Bankrupt. (Referee Findings p. 45 et seq. Am. Plan p. 17, sec. VIII.)

At the time the Company became a debtor, we claimed that its assets were augmented by the stolen property (p. 120). If this were so, we had a right to follow those

stolen assets in equity, and such a right to follow in equity was a property right unaffected by proceedings in 77-B, or subsequent bankruptcy.

Before we could exercise this right to follow, however, both the debtor Company, and our present real opponents, the Company's voluntary backers and unsecured creditors, more than one-half in value of the claims of which latter group were represented by stockholders and including one director of the defaulting company (p. 155), met us on the threshold and through the statutory forms of the 77-B proceeding, by direct solicitation, or by silent acquiescence, or both, induced us to forego prosecution of our right to try to follow the property in consideration of a lien and priority to be given us whereby the claims of the voluntary backers and creditors in and to the assets of the company were voluntarily subordinated to ours (p. 17 et seq).

We thereupon became eighth in line in the claims against the debtor company, and the voluntary backers and creditors became the ninth in line (p. 17, sec. VIII & IX).

The agreement was embodied in writing and its terms were clear and the confirmation of the Court was jurisdictionally, duly and formally entered in every respect as required by the statute covering the 77-B proceedings (p. 17-26).

Every single creditor who would now benefit should the Trustee prevail against us on this hearing, was duly and formally notified and was a regular and formal party to the afore described proceedings.

The acquiescence to the Plan of Reorganization was by one hundred per cent of such creditors (not 66 2-3%, as intimated in Petitioner's Brief) (p. 22).

After the Confirmation of the Plan, pursuant to the Agreement and Order, thousands of dollars in money and property were released and spent under the first seven sec-

tions of the Plan, in full conformity with the Plan,—all presumably in the interest of the debtor and the voluntary creditors as aforesaid (p. 29-34).

This operation under the Plan continued for a period of nearly three years, during which time we continuously relied on the subordination of the Class IX Claimants, the voluntary creditors. During all this time monies were spent and properties disposed of in respect to which, at least in the limits of good faith possibility, we, the Class VIII Claimants, might otherwise have established our trust fund and equitable property right (p. 29-34).

During this entire period no one (and we particularly refer to the Class IX, voluntary creditors) ever complained that the Confirmed Plan was unfair, inequitable, unjust or should be impeached for any reason, or in any particular.

Eventually, a situation was reached where, to all practical intents and purposes, the first seven sections of the Plan had been entirely performed and nothing remained to be done but to sell certain properties and pay off, first the Class VIII creditors, and then the Class IX creditors (p. 29-34).

By this time the Estate had become insolvent in the sense that it could no longer fully meet both the Class VIII as well as the Class IX claims (p. 29-34).

Shortly thereafter, and in April, 1939, before the bankruptcy, the District Court had found that a delay in payment was in strict conformity with the Plan, and authorized it. No creditor, voluntary or otherwise, interposed objection (p. 26-28).

Prior to that time we, the Class VIII creditors, had received a twenty-five per cent (25%) payment upon our secured claims, as aforesaid, without the slightest objection from any of the voluntary (Class IX) creditors (p. 31, 32).

In this state of the record, in the fall of 1939, and alleging that the delay in payment was due to the difficulties of the Real Estate Market, the Trustee, without any visible promptings of any kind from any creditor, then or ever entitled to any payment, but backed only by the joinder of the admittedly insolvent Company, which had no concern of reality or substance in the controversy then or now, petitioned the Court that the debtor be adjudicated a Bankrupt (p. 29-34).

The reception of this petition by the Creditors was so unfavorable that on November 22, 1939, thereafter, the Trustee and the debtor company further petitioned the Court for leave to withdraw their said petition for adjudication and to procure, in the alternative, a further extension of time within which to make remittances to the creditors under the Plan. No creditors whatsoever, of any class, whether entitled to payment or not, objected in any respect to the request to withdraw the petition for adjudication, or to the request for further extension of time to make payments (p. 121-127).

Notwithstanding the premises, the District Court, thus sua sponte, and on its own motion, as we see it, and with no more ostensible grounds than those hereinbefore appearing, on the 12th day of December, 1939, adjudicated the debtor a Bankrupt and on the 13th day of January, 1940, declined to vacate the order at the petition of the Class VIII creditors, Hanssen, et al, the Respondents here (p. 36-41).

In thus declining to vacate the order, the District Court stated in a written opinion, in substance and effect, that it was not the purpose of the District Court by that decision to adjudicate upon our claim of lien or priority and suggested, as we interpret its opinion, that they be determined by filing claim before the Referee (p. 40).

Thereupon our claim of lien and priority was duly presented to the Referee, thus initiating the proceedings wherein the Trustee now seeks certiorari here (p. 41 et seq).

All parties, and the Referee, the District Court and the Circuit Court of Appeals, have treated the proceeding as one for the determination, on the merits, of the relative liens and priorities of the Class VIII claimants against the Class IX claimants. The Trustee was at all times avowedly representing the Class IX claimants as against us, the Class VIII claimants. In the District Court the Class IX claimants appeared by counsel in support of the Trustee as their representative and in the Court of Appeals they filed a Brief Amici Curiae, likewise in strict support of the position of the Trustee (p. 44-49; 128; 200; 202, 203).

No parties are involved in the Bankruptcy proceeding not previously parties to the Reorganization proceedings. As will be hereafter pointed out, the Trustee-Petitioner is, for the purpose of these proceedings, a representative of the Class IX voluntary creditors, else he has no standing in court at all; since he certainly has no interest in the controversy in any other character.

Nothing is being added to or taken from the Bankrupt's estate. The question is purely one of voluntary subordination of one class of creditors.

It is proper also to emphasize that prior to bankruptcy and until now, except as the contrary may be represented by the petition and brief of the Trustee, herein, there has been no pretense or effort to set aside the lien and priority of the Class VIII claimants as improperly obtained, or inequitable in any particular, but, on the contrary, until the time of the bankruptcy adjudication, it has been consistently ratified by all parties by action based on its existence and validity.

The Court's attention is further drawn to the fact that *even to the present point in these proceedings, the Trustee's petition and brief does not, and cannot, seriously pretend that the decision reached by the Circuit Court of Appeals was other than equitable and just in its ultimate outcome in every moral sense.*

ISSUES OF LAW

As to the issues of law, the Referee treating the issue as well made between the two classes of claimants on the merits, destroyed the lien and priority of the Class VIII involuntary creditors and removed the voluntary subordination of the Class IX voluntary creditors, including stockholders and a director, as aforesaid. The District Court affirmed the Referee.

In this condition the case was brought to the Circuit Court of Appeals and we there contended:

1. That the lien and rank established by the Order of Confirmation was "binding" as a juridical fact in conformity with the statute, and must be so treated on subsequent bankruptcy.

2. That even if it was not so binding as an adjudication, still it was binding as a contract for subordination, legally and judicially sanctioned under the facts as given.

3. That even if it were not binding in either of the two ways aforementioned, nevertheless under the peculiar facts of this case, the Court was bound to treat it, on doctrines of laches and equitable estoppel, as though it were so binding, that all parties to the situation had so treated it; and that it was impossible to restore us to our status-quo-ante the proceedings.

In other words, we urged that *even if there were not, in fact, a specific binding contract for subordination on the part of the Class IX creditors, they were, nevertheless, now estopped to deny that such was the fact.*

In substance and effect, the Circuit Court of Appeals, as will appear from the opinion, held that it was unnecessary to decide either of the former two contentions, (1) and (2), since the Court was prepared to hold with us on the last, (3) (Op. C. C. A., Rec. p. 202, 203).

It seems to us that the decision is manifestly correct. It is the only ruling which this record offers for review by this Court.

ARGUMENT

Having thus restated the facts in the record, it must be abundantly evident that the dominating fallacy of the Trustee's petition and brief is to set up alleged "questions of law" predicated on facts having no basis at all, or a basis incorrectly stated, on such record.

Many of petitioner's points are repetitious in substance and, for brevity, these may be grouped.

1. On the merits, recurrent contention of Trustee Petitioner's petition and brief is to the effect 'that the Circuit Court of Appeals "created a priority" thereby defeating the express statutory regimen.' (Petitioner's "Questions" 2 and 3, p. 10, 11, et al, Pet. & Bf.)

This is not the fact. The Circuit Court of Appeals used its clear equitable and statutory powers to subordinate one claimant, or group of claimants, on the equitable considerations existing between the claimants themselves.

> "Certainly, if, as provided . . . a claim which has been allowed may later be rejected in whole or in part according to the equity of the case, *disallowance or subordination in light of equitable considerations may originally be made.*" (Italics ours.)
>
> *Pepper v. Litton,*
> 308 U. S. 295, 308.

Sometimes the Petitioner's contention under present discussion takes the form of assuming that the Circuit Court of Appeals gave us preferences solely by reason of the original embezzlement of our funds.

Such an assumption is wholly unwarranted on the record. We do not claim and the Circuit Court of Appeals did not hold that our lien and priority arose only from the embezzlement of our funds, but rather from the voluntary self-subordination of the voluntary creditors whereby we were lulled into security and lost the means of *following our embezzled funds.*

2. Petitioner's brief next intimates, or states, on several occasions that a bankruptcy creditor can lawfully be subordinated "only for moral turpitude".

We do not think the Chancellor's limitations are so confining:

It seems obvious that, if creditors can voluntarily subordinate themselves by an express contract without offending against the Bankruptcy statute (*Bird and Son Sales Corp. v. Tobin,* 76 Fed. (2d) 371, 373, 100 L. R. A. 654), then they can equally subordinate themselves by acts and omissions which, under equitable principles, estop them to deny the status that such an express contract would have established.

3. The Petitioner's questions numbered 6 to 11, inclusive, are imported vi et armis into this record as hypothetical and moot questions which the Circuit Court did not decide, and had no need to decide, and which the Record itself, therefore, does not offer for determination here.

It may be sufficient to say that the Circuit Court did not hold and did not need to hold that the debtor's assets were, in fact, augmented by the embezzlement, because the voluntary backers in practical effect conceded as much (insofar as they were concerned), by willingly giving lien and priority predicated on that theory.

As formerly stated, the Circuit Court did not hold that a mere assertion of a trust relationship gives a priority, because, on the facts of this case, the assertion of the trust

relationship was followed by a claim of augmentation of assets and a voluntary acknowledgment that such claim was at least contestible—this by the voluntary subordination of the voluntary backers, as aforesaid.

The Circuit Court expressly declined to determine the effect of the Confirmed Plan as a contract, or judgment, beyond the equitable subordination of the voluntary backers on the particular facts of the case.

4. The Trustee, by his questions 12 and 13, seeks to import the Chandler Act, in some especial aspect, into this controversy. In the Chandler Act, as in every other bankrupty statute, claims may be subordinated on equitable principles, and that is what was here done. Other questions on the Chandler Act are moot at this point in the controversy.

The Trustee's somewhat complicated sixth question (Petition and Brief, p. 11, 12), if we understand it, draws out of thin air a legal issue never raised by any party below and on which there is no occasion for controversy. Answering it as we understand it, the Class VIII claimants readily agree that they are bound by acquiescence in the Confirmed Plan (the same as they assert that the Class IX claimants are bound), and it is now, not only physically and legally impossible for them to assert their original right to follow trust property as it existed prior to the Plan, but also they have never desired, or pretended, to have a right to do so after their acquiescence in the confirmation of the Plan. Our only contention is that the Class IX claimants are similarly bound, and such is the decision of the Circuit Court of Appeals.

5. Petitioner's position in newly-taken procedural aspects of his argument (Question 1, p. 10, Petition and Brief) seems to be:

'That the Court should not have subordinated the Class IX claimants except in a proceeding for an order of distribution rather than on the proceeding actually adopted for

the determination of the nature of the claims of the Class VIII claimants.'

It will be noted at once that this position of the Trustee is highly technical and has no foundation in substantial justice. The voluntary Class IX creditors were represented (and perhaps too thoroughly represented, considering his supposedly neutral position as an officer of the District Court, and that these proceedings are at the expense of the Bankrupt's estate), by the Trustee himself in the present proceeding for the determination of lien and priority of our claim.

In addition to that, Class IX claimants had their own counsel in the hearing before the District Court, were in the Circuit Court of Appeals and filed briefs as amici curiae—their argument in each case being practically identical with that of the Trustee.

Every one concerned, including the Referee and Courts, treated our claims from inception as specifically designed for the determination of the relative lien and priority of the two classes of creditors.

At this late stage, therefore, to assert that we should have waited to litigate our lien and priority until a question of distribution, would be to make a mockery of the whole proceedings.

Indeed, if the Trustee was not and is not at all times representing the Class IX claimants as against us in this proceeding from its inception, then it is difficult to see how he would have any standing, even in this Court at this time, since the Bankrupt's estate is manifestly affected in no other particular than by a determination of the relative rank of the two groups of creditors.

It is safe to assert that if we had attempted to defer the litigation of our lien and priority to the time of a final distribution order, the Trustee would have been the first to

say that such would be too late and that we had lost our rights by such delay.

In fact, this Court will note the obvious inconsistencies in the position of Trustee-Petitioner wherein he asserts, in one breath, that we are already too late in litigating our position, which he now claims was adjudicated against us by the mere bankruptcy adjudication (p. 46, 47, Trustee's Brief); whereas, in the next breath, he asserts that we are premature in the respect that our rank and lien should be determined on a later proceeding for distribution.

Manifestly, the Petitioner Trustee cannot be right on both wings of his inconsistency. We think he is wrong on both and that the rank of the classes were and are properly adjudicated in the determination of our claims upon the proceedings specifically brought for that purpose and acted upon by the Referee and both lower courts as appropriate for such.

6. The Trustee's remaining questions 14 to 16, seek to evoke obiter from this Court condoning the action of the District Court in suppressing praecipaed veritable parts of its own record in the cause (p. 13, 14, Pet. & Bf.).

If the Circuit Court of Appeals considered the suppressed portions of the record, the Circuit Court of Appeals was most manifestly within its rights under the "Rules of Civil Procedure" promulgated by this Court.

Yet, the Circuit Court's opinion could have been, and perhaps was, made on the record without those suppressed portions.

The fact of the trust-fund-conversions (main substance of the suppressed record) appears in the very findings of the Referee, which the Trustee Petitioner sought, and seeks, to sustain,—this in addition to a very clear intimation of the fact from the Plan itself.

The other parts of the diminished record bore only on the alleged abuse of discretion of the District Court. As to whether or not the District Court abused its discretion in these proceedings, the Circuit Court did not need to decide and, therefore, did not decide.

7. The portion of Trustee-Petitioner's Summary and Argument under Roman Numeral II, on page 25 of his Brief, is a mere repetition of his Argument in the Circuit Court of Appeals and is, as we submit, satisfactorily answered in the opinion of the Circuit Court of Appeals as well as by our Reply Brief, therein, both appearing in the transcript on file here (Rec. p. 200-204; 185-199).

As previously indicated, it would serve no good purpose to examine the many cases cited in Trustee-Petitioner's Brief, none of which are subjected to an analysis of fact, or even used for purposes of quotation, and, as to which, it is safe here to state that they do not militate in any degree against the correctness of the decision rendered by the Circuit Court of Appeals in this cause.

CONCLUSION

Without going into further detailed discussion of Petitioner's petition and brief, it is sufficient to submit that the foregoing considerations indicate:

1. That there is no novel question presented on this record;

2. That there is, on this record, no question of bankruptcy which has not been already settled by this Court;

3. That the decision of the Circuit Court of Appeals conflicts with that of no other Circuit Court;

4. That it is amply sustained by the decisions of this Court cited in the decision of the Circuit Court of Appeals;

5 and 6. That it is not in conflict with any decision of this Court;

7 to 9. That there has been no departure from accepted judicial procedure.

The foregoing obviates the necessity of further specific reference to the "Specification of Errors", "Summary of Argument" and "Argument", all of which are repetitious in respect to law points presented.

We conclude, as in the Circuit Court of Appeals, that the plain and simple facts of the case speak for themselves, amply to justify the decision of the Circuit Court of Appeals under question here:

A defaulting company steals specific property from certain of its principals. When these victims try to follow their property in 77-B proceedings, they are met by the debtor itself and voluntary backers and creditors of the defaulting company who induce the victims to give up their equitable right to follow their property in consideration that they should thereafter have a lien and priority to secure the return of the stolen money and that the voluntary backers and creditors would voluntarily subordinate themselves for this purpose.

This arrangement is promulgated and accepted by all parties in interest, including the real parties in interest now here, with full and fair consideration and due formality, and is thereupon approved by the District Court with full jurisdiction and in strict statutory form as fair and equitable in every particular.

The fairness and equity of the solemn property settlement thus unanimously agreed upon and the equally solemn

unappealed Confirmatory order of the District Court have never to this day been attacked.

The same parties who promulgated the program, however, are now the real parties in interest as represented by the Trustee in this Court, still seeking, on technical grounds, notwithstanding a full and careful determination by the Circuit Court of Appeals, a repudiation of the very arrangement by which they have already, for their benefit, obtained two and a half years delay, thus palpably defeating any possible reclaim proceedings by the defrauded victims of the Bankrupt, paid off thousands upon thousands of dollars more in administration fees paid either directly or indirectly, at least in presumption of law, to their benefit.

No amount of elaborate argument can conceal the facts just hereinbefore stated. It is little wonder that the Circuit Court of Appeals has declined to lend itself to any such inequitable program of the Trustee; but, rather, has invoked the dictum of this Court:

> "They (equitable powers of Bankruptcy Courts) have been invoked to the end that fraud will not prevail, *that substance will not give way to form, that technical considerations will not prevent substantial justice from being done.*" (Italics ours.)
>
> *Pepper v. Litton,*
> 308 U. S. 295, 308.

Respectfully submitted,
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Attorney for Respondents.